## IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

Assigned on Briefs November 16, 2004

## STATE OF TENNESSEE v. KATHY CHANCE CUTSHAW

Direct Appeal from the Circuit Court for Blount County No. C-14042 D. Kelly Thomas, Jr., Judge

No. E2004-00799-CCA-R3-CD - Filed May 5, 2005

The Defendant, Kathy Chance Cutshaw, was convicted by a jury of aggravated assault by use or display of a deadly weapon, a Class C felony. See Tenn. Code Ann. § 39-13-102(a)(1)(B), (d)(1). Following a sentencing hearing, the trial court sentenced the Defendant as a Range I standard offender to four years and six months, to be served in split confinement. The Defendant now appeals her sentence, contending that the trial court erred in ordering her to serve any time in confinement. We modify the Defendant's sentence to four years but otherwise affirm the trial court's judgment.

## Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified

DAVID H. WELLES, J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA McGee Ogle, JJ., joined.

Joseph Costner, Maryville, Tennessee (at trial) and Julie A. Rice, Knoxville, Tennessee (on appeal) for the appellant, Kathy Chance Cutshaw.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Mike Flynn, District Attorney General; and Ellen Berez, Assistant District Attorney General, for the appellee, State of Tennessee.

## **OPINION**

The Defendant was seeking a divorce from her husband, the victim in this case, Mr. Michael Cutshaw. On the morning in question, the Defendant was at her lawyer's office reviewing the divorce papers her lawyer had prepared. Mr. Cutshaw also appeared at the lawyer's office and read the proposed marital dissolution agreement. Finding a term that he did not agree with, he told the Defendant that he was not going to sign the papers. He then left the office and began walking across the parking lot to his truck.

The Defendant also left the law office and confronted Mr. Cutshaw in the parking lot. The proof established that the Defendant pulled a pistol out of the waistband of her pants. The gun was loaded and cocked. A struggle between the Defendant and the victim ensued, during which the gun was fired numerous times. Police officers later recovered five shell casings and one live round from the area. There were a number of people working in the buildings in the immediate vicinity of the parking lot when the altercation occurred. At least one other person was in the parking lot itself. Fortunately, no one was injured by the gunshots.

The police arrived and took both the Defendant and the victim into custody. The Defendant was subsequently indicted for aggravated assault with a deadly weapon. <u>See</u> Tenn. Code Ann. § 39-13-102(a)(1)(B). After a trial, the jury convicted the Defendant as charged. The Defendant does not contest her conviction.

At the sentencing hearing, the Defendant testified that, fifteen years earlier, she became a licensed real estate agent. She placed her license on inactive status following a car accident in which one of her children was seriously injured and needed her full-time care. Shortly before the sentencing hearing, she applied to reactivate her license and had made arrangements to return to work as a real estate agent in the near future. She stated that she had been diagnosed with "[a]ttention deficit hyperactivity and anxiety, and at times . . . had depression." She was taking several prescribed medications for her condition and was doing well with them. She stated that she was seeing a psychiatrist every three months. She testified that "there really are no words to express the regret" that she felt about her crime, and she apologized to "[e]veryone who was frightened, everyone who was involved, everyone who has been a part of my life [and] the general citizens of Blount County."

The trial judge ruled on the Defendant's sentence as follows:

Based upon the verdict of the Jury, it is the judgment of the Court that you are guilty of aggravated assault. No fine is imposed. It was not imposed by the Jury. The range of punishment is three to six years. I am sentencing you, for reasons I'll go into here in just a minute, to four years and six months.

I found the enhancing factors of no hesitation in committing the offense when the risk to human life was high to be very substantial, weighed that heavily. And, as well, that the offense was committed under circumstances under which the potential for bodily injury was great, not only to the victim Mr. Cutshaw, but also to Mr. Hickman and to the occupants of the State office building there close to, where the bullet hit the wall. I think those justified enhancing this sentence to six years.

In mitigation, I found from the proof--and this is--I mean, this is a case with a lot of extremes in it. Extremely good or extremely bad. And I found that you have a good work history, that you have no criminal record of any significance at all. I find that for several years, you had suffered from some serious emotional and psychological problems. Whereas those have been managed to some extent medically, I think it's still something that has to be considered in mitigation when

you put this offense in the context of a divorce situation. And I think that you expressed an appropriate remorse in an appropriate way. So, I mitigated the sentence from six years down to four and a half years.

Now, in deciding the manner of service, these things that I've just mentioned weigh into that. Also, I think a lack of confinement would depreciate the seriousness of this offense, but on the other hand, I think your history up to the time that this happened, I think, would make a prison sentence inappropriate. I think rehabilitation will be difficult, but it can be done. And I've considered all the evidence that I've heard at trial and today, also.

So, I'm going to impose a split confinement of one year in the jail and the balance on intensive probation.

The Defendant now argues that the trial court erred in ordering her to serve any of her sentence in confinement. She further argues that the trial court erred in failing to apply additional mitigation factors, but does not argue that the length of her sentence should be reduced to any particular length of time.

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b); State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this Court has a duty to conduct a <u>de novo</u> review of the sentence with a presumption that the determinations made by the trial court are correct. <u>See</u> Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." <u>State v. Ashby</u>, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. <u>See State v. Fletcher</u>, 805 S.W.2d 785, 789 (Tenn. Crim. App., 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act, and (2) the trial court's findings are adequately supported by the record. <u>See State v. Arnett</u>, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that

a sentence is improper is upon the appealing party. <u>See</u> Tenn. Code Ann. § 40-35-401 Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

In this case, the trial court applied two enhancement factors. First, the trial court determined that, in committing the instant offense, the Defendant "had no hesitation about committing a crime when the risk to human life was high." Tenn. Code Ann. § 40-35-114(11). Second, the trial court determined that the crime "was committed under circumstances under which the potential for bodily injury to a victim was great." Id. § 40-35-114(17). Although not challenged by the Defendant, the trial court erred under Tennessee law when it applied factor (17). The Defendant was charged with and convicted of committing an aggravated assault with a deadly weapon against a specific, named victim, to wit, Mr. Cutshaw. Our supreme court has held that the "elements of an aggravated assault against a specific, named victim are reflected in the statutory language of the enhancement factor [for committing the crime under circumstances under which the potential for bodily injury to a victim is great], thus rendering its application to enhance the sentence inappropriate." Imfeld, 70 S.W.3d at 706. Accordingly, the trial court should not have applied this enhancement factor to increase the Defendant's sentence. The trial court's application of enhancement factor (11) was proper, however, based on the presence of a person other than the victim in the parking lot as well as the presence of several persons in a nearby building which was struck by one of the bullets. See Imfeld at 707. The trial court considered factor (11) to be "very substantial" and weighed it "heavily."

The Defendant was sentenced as a Range I standard offender. The Range I sentence for a Class C felony is three to six years. See Tenn. Code Ann. § 40-35-112(a)(3). The presumptive sentence for a Class C felony is the minimum in the range, here, three years. See id. § 40-35-210(c). Based on enhancement factors (11) and (17), the trial court initially enhanced the Defendant's sentence to the maximum of six years. See id. § 40-35-210(e) ("Should there be enhancement and mitigating factors for a Class B, C, D or E felony, the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors.")

The trial court then turned to mitigating factors and determined that several existed: the Defendant's work history, her lack of a significant criminal record, her mental health problems, the fact that the offense was committed in the context of the Defendant's divorce from the victim, and the Defendant's expression of remorse. Based on these considerations, the trial court reduced the Defendant's sentence one and one-half years to four and one-half years. The Defendant argues that the trial court should also have found in mitigation that "[s]ubstantial grounds exist[ed] tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense." See id. § 40-35-113(3). The Defendant asserts that the trial court should have applied this mitigating factor because she "genuinely believed her husband was a threat to her based on his past actions, and she carried the gun for self-defense."

First, the trial court's reference to the context of the assault--the parties' divorce proceedings--makes clear that the trial court took this mitigating factor into consideration. Second, the Defendant's conduct in initiating the confrontation with the victim belies her declarations of fear and

self-defense. The Defendant is not entitled to any further reduction in the length of her sentence based on this mitigating factor.

The Defendant also argues that the trial court should have applied as a mitigating factor that she, "although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct." Id. § 40-35-113(11). Again, we are confident that the trial court took the circumstances of the offense into sufficient account when it reduced the Defendant's sentence by one and one-half years. We also note that, during the Defendant's trial, Detective David Graves testified that the Defendant did not have a permit for the gun she was carrying and with which she assaulted the victim. We therefore question the Defendant's claim that she lacked a sustained intent to violate the law.

We decline to reduce the length of the Defendant's sentence based on the application of additional mitigating factors. However, based on the trial court's misapplication of enhancement factor (17), we reduce the Defendant's sentence by six months to a total of four years.

We turn now to the trial court's order that the Defendant serve her sentence in split confinement. The Defendant contends that the trial court erred in ordering her to serve one year in confinement and requests this Court to modify her sentence "to one of full probation, or alternatively, to probation with Community Corrections program participation as an additional probationary requirement." We respectfully refuse the Defendant's request.

A defendant is eligible for probation if the actual sentence imposed upon the defendant is eight years or less and the offense for which the defendant is sentenced is not specifically excluded by statute. See Tenn. Code Ann. § 40-35-303(a). The trial court shall automatically consider probation as a sentencing alternative for eligible defendants; however, the defendant bears the burden of proving his or her suitability for probation. See id. § 40-35-303(b). No criminal defendant is automatically entitled to probation as a matter of law. See id. § 40-35-303(b), Sentencing Commission Comments; State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). Rather, the defendant must demonstrate that probation would serve the ends of justice and the best interests of both the public and the defendant. See State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002).

Our Criminal Sentencing Reform Act of 1989 specifically provides, however, that sentences involving confinement are appropriate where:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1); see also State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000). Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. See Tenn. Code Ann. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. See id. § 40-35-103(5).

The trial court cited two reasons for imposing a one year term of confinement. First, the trial court determined that "a lack of confinement would depreciate the seriousness of this offense." Second, the trial court determined that "rehabilitation will be difficult, but it can be done." The evidence supports these determinations by the trial court and we agree that the trial court's imposition of split confinement is appropriate in this case. The Defendant decided to carry a loaded gun into her lawyer's office in conjunction with seeking a divorce against her husband, the victim. When the victim refused to accommodate the Defendant's demands and tried to leave the office, the Defendant accosted the victim in the parking lot and pulled her gun. Numerous people were put at risk when the Defendant's gun began firing during the victim's efforts to disarm the Defendant and protect himself from being shot. The Defendant could have avoided the confrontation with the victim had she so chosen. Instead, she chose to risk the grievous injury or death of herself, the victim and/or totally innocent bystanders. One year of confinement followed by probation is an appropriate sentence in this case and will, we are confident, increase the Defendant's chances of a successful rehabilitation.

We reduce the Defendant's sentence to four years. We affirm the trial court's judgment as to manner of service.

DAVID H. WELLES, JUDGE